

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SHAWN MICHAEL THOMAS,

Petitioner,

vs.

GREGORY SMITH, et al.,

Respondents.

Case No. 3:10-CV-00593-LRH-(RAM)

ORDER

The court found that this action appeared to be untimely. Order (#3). Petitioner has filed a response to order to show cause why this action should not be dismissed (#6). The court finds petitioner's arguments unpersuasive, and the court dismisses the action.

Part of petitioner's argument is an attempt to re-litigate the court's denial of his motion for appointment of counsel in a different case, Thomas v. Smith, 3:10-CV-00592-LRH-VPC. That argument is not relevant to whether this action is untimely.

Petitioner next argues that cause and prejudice exist to excuse the procedural default caused by his untimely state habeas corpus petition. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). First, the court determined that this action appears to be untimely, not that petitioner's claims are procedurally defaulted. A showing of cause and prejudice is irrelevant to whether this action is untimely. Second, as the court explained in its earlier order (#3), even if the time that petitioner spent on his state habeas corpus petition was tolled pursuant to 28 U.S.C. § 2244(d)(2), this action still would be untimely.

1 Petitioner has not challenged the court's computation of time, nor has he presented any facts
2 that could show he was pursuing his rights diligently and that extraordinary circumstances prevented
3 timely filing, to warrant equitable tolling. See Holland v. Florida, 130 S. Ct. 2549, 2560 (2010).

4 Reasonable jurists would not find this conclusion to be debatable or wrong, and the court
5 will not issue a certificate of appealability.

6 Petitioner has submitted a motion for appointment of counsel. This motion is moot because
7 the court is dismissing the action.

8 Petitioner has submitted a motion to file supporting documents under seal. The documents
9 in question describe petitioner's mental health history and medications, and good cause exists to
10 keep these documents under seal.

11 IT IS THEREFORE ORDERED that the clerk shall add Catherine Cortez Masto, Attorney
12 General for the State of Nevada, as counsel for respondents.

13 IT IS FURTHER ORDERED that the clerk shall electronically serve upon respondents a
14 copy of the petition. No response is necessary.

15 IT IS FURTHER ORDERED that the clerk of the court file the motion for appointment of
16 counsel and the motion to file supporting documents under seal.

17 IT IS FURTHER ORDERED that the motion for appointment of counsel is **DENIED** as
18 moot.

19 IT IS FURTHER ORDERED that the motion to file supporting documents under seal is
20 **GRANTED**. The documents contained in the docket at #1-5 shall remain under seal.

21 IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice as untimely.
22 The clerk of the court shall enter judgment accordingly.

23 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

24 DATED this 24th day of January, 2011.

25 

26 LARRY R. HICKS
27 United States District Judge
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